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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/038,559	01/04/2002	Douglas Fenwick	28809.0002	7146

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EXAMINER

FLANDRO, RYAN M

ART UNIT

PAPER NUMBER

3679

DATE MAILED: 11/25/2002

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Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/038,559	FENWICK ET AL.
	<b>Examiner</b>	Art Unit
	Ryan M Flandro	3679

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on \_\_\_\_ .
- 2a) This action is FINAL.                  2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_ is/are allowed.
- 6) Claim(s) 1-16 is/are rejected.
- 7) Claim(s) \_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 04 January 2002 is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) The proposed drawing correction filed on \_\_\_\_ is: a) approved b) disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) The oath or declaration is objected to by the Examiner.

#### Priority under 35 U.S.C. §§ 119 and 120

- 13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some \* c) None of:
1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_ .
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) The translation of the foreign language provisional application has been received.
- 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_ .
- 4) Interview Summary (PTO-413) Paper No(s) \_\_\_\_ .
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: \_\_\_\_ .

## **DETAILED ACTION**

### ***Information Disclosure Statement***

1. The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609 A(1) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

### ***Drawings***

2. This application has been filed with informal drawings which are acceptable for examination purposes only. Formal drawings will be required when the application is allowed. See the attached Draftperson's Patent Drawing Review PTO-948.

### ***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 1-16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

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- a. Claims 1 and 9. Claims 1 and 9 recite the limitation "the juncture" in lines 10 and 8 of each claim, respectively. There is insufficient antecedent basis for this limitation in the claims because no juncture is previously recited.
- b. Claims 2 and 10. Claims 2 and 10 recite the limitation "the at least 50% to 95% is about eighty percent." This limitation renders the claim indefinite because it is unclear what structure is being referenced. The Examiner suggests inserting the phrase --the exposed depth of each side edge-- at an appropriate point in the claim.

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Applicant is reminded that this application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

7. Claims 1, 2, 4-10, and 12-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cantley (US 6,286,284).

c. Claim 1. Cantley discloses a polymeric lattice fence **50** comprising a unitary polymeric structure **50** having a framework of at least one first extension **52** and at least one second extension **60**, the first and the second extensions **52, 60** appear to cross over each other at different angles to form a network of apertures between the extensions **52, 60**; the first and second extensions **52, 60** each having a length, a width, two side edges **58**, and a depth that are the same or distinct. (See figures 6-9; column 3 line 25 – column 4 line 25; see also prior art figures 4 and 5).

i. Although Cantley discloses that the members could lie in either the same or offset planes (see column 3 lines 62-64), he fails to explicitly disclose that at a juncture where the first and second extensions appear to cross over each other, at least 50% to 95% of the depth of each side edge is exposed and the remaining portion of the depth of each side edge is merged with the other extension.

ii. It would have been obvious, however, to one having ordinary skill in the art at the time the invention was made to provide at least 50% to 90% of the depth of each side exposed with the remaining portion of the depth of each side merged with the other extension since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 U.S.P.Q. 233, 235 (CCPA 1955).

- d. Claim 9. Cantley, as applied in subsection 6(a) above, includes all of the limitations of claim 9 as well as the method of manufacturing the unitary polymeric lattice fence **50** comprising injecting a polymeric material into a mold having a predetermined shape (column 4 line 14).
- e. Claims 2 and 10. Cantley, as applied above, discloses all of the limitations in claims 2 and 10 except that the [amount of side edge **58** exposed] is about eighty percent [of the total depth]. It would have been obvious, however, to one having ordinary skill in the art at the time the invention was made to provide 80% of the depth of each side **58** exposed with the remaining portion of the depth of each side **58** merged with the other extension **52 or 60** since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 U.S.P.Q. 215 (CCPA 1980).
- f. Claims 4 and 12. Cantley further discloses that the first and second extensions **52, 60** are at an obtuse angle to each other (column 3 line 65 – column 4 line 2).
- g. Claims 5 and 13. Cantley further discloses that the first and second extensions **52, 60** are at a right angle to each other (column 3 lines 65-67).
- h. Claims 6 and 14. Cantley further discloses that the first and second extensions **52, 60** are at an acute angle to each other (column 3 line 65 – column 4 line 2).
- i. Claims 7 and 15. Cantley further shows that the apertures are four-sided polygons (see figure 6).
- j. Claims 8 and 16. Cantley further shows that the apertures are defined by a continuous curvilinear line (see figure 6).

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8. Claims 3 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cantley in view of Cowan (US 5,865,427).

a. Claims 3 and 11. Cantley discloses all the limitations of claims 3 and 11, including the fact that the lattice is formed of plastic, but does not explicitly state that the polymeric material is polyethylene.

i. Cowan, however, teaches that it is common to form such plastic fencing from polyethylene (column 2 lines 34-38).

ii. Additionally, it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 U.S.P.Q. 416, 417-18 (CCPA 1960).

iii. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made modify the plastic lattice fence of Cantley by providing that it be made specifically of polyethylene.

### ***Conclusion***

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The following patents are cited to further show the state of the art with respect to polymeric lattice fences:

U.S. Patent Publication US 2001/0000557 A1 to Cantley

U.S. Patent 6,470,643 to Cantley

U.S. Patent 6,308,487 to Cantley

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U.S. Patent 2,752,276 to WOOCK

U.S. Patent 2,672,658 to PEDERSEN

U.S. Patent D442,701 to CANTLEY

U.S. Patent D423,687 to CANTLEY

U.S. Patent D402,381 to GRUDA et al.

U.S. Patent D374,485 to BROWN

U.S. Patent D366,532 to HERBST et al.

U.S. Patent D357,073 to REUM

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ryan M Flandro whose telephone number is (703) 305-6952. The examiner can normally be reached on 8:30am - 5:30pm Mon-Fri.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lynne H Browne can be reached on (703) 308-1159. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9326 for regular communications and (703) 872-9327 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.

Ryan M. Flandro  
November 19, 2002

  
**Lynne H. Browne**  
**Supervisory Patent Examiner**  
**Technology Center 3670**